



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

November 30, 1998

Ms. Joni M. Vollman  
Assistant County Attorney  
County of Harris  
201 Fannin, Suite 200  
Houston, Texas 77002-1901

OR98-2894

Dear Ms. Vollman:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 120176.

The Harris County District Attorney's Office received a request for documents pertaining to Donald Anthony Miller who was convicted of capital murder. The requested documents include "all records and documents pertaining to or arising from: (1) the investigation of the crime; (2) the arrest; (3) the trial of the underlying matter or plea negotiations; (4) the investigation or prosecution of any proceedings after trial, including motions for new trial and direct appeal."<sup>1</sup>

You indicate that you will release certain documents, and that you wish to withhold the remaining documents. You submit a representative sample of the documents you wish to withhold.<sup>2</sup> You claim that three categories of information are excepted from disclosure by sections 552.101, 552.103, 552.108, and 552.117 of the Government Code. We have considered the exceptions you claim and have reviewed the sample documents you have submitted, Exhibits A and B.

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<sup>1</sup>You have furnished us with only the first page of the request for information. Any subsequent page is unavailable to us. This ruling assumes that there is no additional request for information on the missing page. If the requestor seeks additional information on page two of his request, the information requested on page two is presumed public. Gov't. Code § 552.301(c).

<sup>2</sup>We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988); 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

You first argue that the information in Exhibit A is excepted from disclosure by section 552.108. Section 552.108 of the Government Code provides in part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:

\* \* \*

(3) it is information that:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation;

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

\* \* \*

(c) This section does not except from the requirements of Section 552.021 information that is basic information about an arrested person, an arrest, or a crime.

Gov't Code § 552.108. Generally, a governmental body claiming an exception under section 552.108 must reasonably explain, if the information does not supply the explanation on its face, how and why section 552.108 is applicable. *See* Gov't Code §§ 552.108, .301(b)(1); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You explain that the handwritten notes and some of the documents in Exhibit A constitute the prosecutor's work product. After examining Exhibit A, it appears that some of the handwritten notes and documents were prepared by an attorney representing the state in criminal litigation; however, Exhibit A also includes handwritten and typed notes that do not appear to have been prepared by an attorney. We agree that the following documents, containing prosecutors' work product, that you submit to this office in Exhibit A are exempt under section 552.108 of the Government Code: the handwritten and typed notes of the prosecutors (including the notes on the autopsy report<sup>3</sup>), the juror, witness, and exhibit lists. Therefore, you may withhold these records in Exhibit A under section 552.108(a)(3)(A) of the Government Code.

You also contend that the submitted documents are exempt from disclosure under section 552.103 of the Government Code. You represent that the case is currently in federal

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<sup>3</sup>You state that a clean copy of the autopsy report will be disclosed.

post-conviction habeas litigation. You may withhold the documents in Exhibit A prepared by investigators pursuant to section 552.103(a) of the Government Code. In reaching this conclusion, however, we assume that the opposing party to the anticipated litigation has not previously had access to the records at issue; absent special circumstances, once information has been obtained by all parties to the litigation, *e.g.*, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). If the opposing party in the litigation has seen or had access to any of the information in these records, there would be no justification for now withholding that information from the requestor pursuant to section 552.103(a).

You argue that the material in Exhibit B must be withheld under section 552.101. Section 552.101 of the Government Code excepts from disclosure "information deemed confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Federal regulations prohibit the release of criminal history record information ("CHRI") maintained in state and local CHRI systems to the general public. *See* 28 C.F.R. § 20.21(c)(1) ("Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given."), (2) ("No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself."). Section 411.083 provides that any CHRI maintained by the Department of Public Safety ("DPS") is confidential. Gov't Code § 411.083(a). Similarly, CHRI obtained from the DPS pursuant to statute is also confidential and may only be disclosed in very limited instances. *Id.* § 411.084; *see also id.* § 411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). Therefore, any CHRI in your possession that falls within the ambit of these state and federal regulations must be withheld.

Exhibit A contains the home telephone numbers and pager numbers of peace officers. Section 552.117(2) provides for the confidentiality of the home addresses, home telephone numbers, and social security numbers of peace officers, as well as information that reveals whether the peace officer has family members. You must withhold the peace officers' home telephone numbers listed in Exhibit A from disclosure. In Open Records Decision No. 506 (1988), this office stated that one purpose of section 552.117 is to protect public officials and employees from being harassed while at home. *Id.* at 5. We agree that the peace officers' pager numbers must also be withheld from disclosure pursuant to section 552.117(2).<sup>4</sup>

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<sup>4</sup>We assume for purposes of granting section 552.117 that the pagers were purchased and are privately owned by the peace officers. *See* Open Records Decision No. 506 at 5-6 (1988) (statutory predecessor to section 552.117 does not apply to cellular mobile phone numbers paid for by county and intended for use at work for county business; different considerations apply if employee pays for purchase and installation of and calls to and from mobile phone in his private vehicle and simply seeks reimbursement for calls made on county business).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Emilie F. Stewart  
Assistant Attorney General  
Open Records Division

EFS/nc

Ref.: ID # 120176

Enclosures: Submitted documents

cc: Philip H. Hilder  
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(w/o enclosures)